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HAROLD B. WILLEY, C

In the

Supreme Court of the United States

October Term, A. D. 1954

No. 680

ISTHMUS DEVELOPMENT COMPANY,
Petitioner,

v.

EDWARD R. BURT,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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v.

EDWARD R. BURT,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Honorable Earl A. Warren, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your Petitioner respectfully shows:

I.

OPINIONS OF THE COURTS BELOW

A. The District Judge did not file a formal opinion. A copy of the Order of Dismissal is appended to this petition (Appendix i) and also appears at R. 252.

B. A copy of the opinion of the Court of Appeals for the Fifth Circuit is appended hereto (Appendix ii), appears at R. 262, and is reported in 218 F. 2d 353.

II.

JURISDICTION

A. The date of the judgment of the Court of Appeals for the Fifth Circuit sought to be reviewed and of its entry is January 12, 1955. (Appendix xiii; R. 272.)

B. The date of the order denying a Petition for Rehearing is February 3, 1955. (Appendix xiv; R. 286.)

C. The statutory provision which is believed to sustain the jurisdiction of this Court is Section 1254 of Title 28 of the United States Code.

III.

QUESTIONS PRESENTED FOR REVIEW

A. In this suit brought in the United States District Court for the Northern District of Texas by a citizen of New York against a citizen of Texas, arising out of voluntary transactions between them occurring in the Republic of Mexico and governed by its laws, did the District Judge commit reversible error in sustaining a motion to dismiss on the ground that the more convenient and proper forum was the Republic of Mexico?

Had the suit been brought in a Texas Court, such Court would have declined jurisdiction because of: 1. the difference between the law of Mexico and the law of Texas, 2. the ability of the plaintiff to subject the defendant to judicial process in Mexico and enforce a judgment there, and 3. the burden placed on the Texas courts of adjudicating rights originating outside of the State.

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With respect to the doctrine of *forum non conveniens* generally, the proof discloses, and it is presumed the District Judge found: 1. that the defendant was amenable to process in Mexico, 2. that the controversy must be decided according to the law of Mexico, 3. that the defendant's witnesses reside in Mexico, and 4. that the equipment sought to be recovered and the only assets out of which a money judgment might be satisfied are located in that country.

IV.

STATEMENT OF THE CASE

In June, 1952, the Respondent, Edward R. Burt, entered into a contract with Petroleos Mexicanos, a Government Institution, to drill for oil in certain areas in the States of Chiapas and Tabasco in Mexico (R. 32). Being without experience, equipment or personnel to perform the contract, the Respondent initiated negotiations with Petitioner to furnish the wherewithal by which Respondent could perform his contract. (D. 4, R. 152, D. 1, R. 150, R. 98.) The negotiations resulted in a written instrument signed by the parties (R. 16), the payment by Respondent of advance drilling-rig rental amounting to $20,000.00, and the deposit of $7,500.00 to defray anticipated expenses. (D. 12, R. 165.) Respondent also placed in Petitioner's possession welding equipment and a bulldozer to be used in the operation (R. 3). Following this commitment on November 10, 1952, Respondent on November 29, 1952, sent Petitioner a telegram in which Respondent stated he

had decided not to proceed because of many factors over which he had no control. (R. 27, R. 180.)

Respondent, a resident and citizen of New York, sued the Petitioner, a Texas corporation, in the United States District Court for the Northern District of Texas, to recover the $27,500.00 cash previously paid by him to Petitioner and for the value of the bulldozer and welding equipment, or in the alternative, for the restoration of possession of such personal property which was located at Petitioner's camp in the Republic of Mexico. (R. 1-5.)

The Petitioner filed a motion urging the dismissal of the suit because the District Court was without jurisdiction and because the forum was an inconvenient one. (R. 48.)

In support of the motions Petitioner alleged: (1) that all of the transactions pleaded occurred in Mexico and were governed by the laws of that Republic, a Civil Law nation whose laws the Federal District Court of Texas is not empowered to administer or enforce because of the difference between the Common Law and the Civil Law; (2) that Petitioner was organized as a "Western Hemisphere Trade Corporation" (see 56 Stat. 838; 26 U. S. C. A. 109), all of whose business other than the purchase of equipment in the United States had been and was being conducted in Mexico; that all of its records were in Mexico and all of the individuals involved in the negotiations with Respondent were residing and working in Mexico; (3) that Petitioner was amenable to process in Mexico; (4) that the operations being carried on by Petitioner at that time re-

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quired the constant presence and supervision of R. E. O'Donnell, Petitioner's General Manager in Mexico, and that it would cause serious hardship to Petitioner for him and the other individuals to be present for the trial in Texas; (5) that the Respondent was simply seeking to vex and harass Petitioner by the institution of the suit in Texas; (6) that all of Petitioner's assets except for some $4,000.00 or $5,000.00 were located within the Republic of Mexico and any judgment which the Respondent might obtain could not be enforced by the United States District Court for the Northern District of Texas; (7) that it would be an imposition upon the citizens of the Northern District of Texas who might be required to serve as jurors to spend their time in attempting to solve a controversy which was of entirely foreign interest. (R. 48.)

The allegations were supported by documentary evidence, affidavits (R. 55-70), oral depositions (R. 70-201), and oral testimony on presentation of the motions (R. 235-251). The counter affidavit filed by the Respondent (R. 231) does not disclose any material dispute as to the facts set out in the Petitioner's affidavits, the chief controversy being the legal effect of the matters sworn to. That the Petitioner is amenable to process in Mexico (R. 63) is uncontroverted.

The dispute between the parties on the merits is whether or not a contract was made between them and whether possession of the personal property is illegally detained Although a written instrument defining their obligations was signed by both parties (R. 16-26), the Respondent con-

tends that no contract was made and that he is entitled to a refund of the money paid by him as advance rental and deposit to defray expenses and the return of the equipment. The Petitioner contends that a contract was made, that Respondent breached the same, and that the only issue is one of accounting. The dispute must be resolved under the Mexican Law.

The District Judge sustained the *forum non conveniens* part of the motion and dismissed the case without prejudice (Appendix i; R. 252). The Court of Appeals for the Fifth Circuit reversed the judgment of dismissal and remanded the cause for further proceedings (Appendix xiii; R. 272). The Court of Appeals held that the District Court lacked discretion in this case to decline jurisdiction because both parties were American citizens and the only other competent tribunal was in a foreign country.

V.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

A. The United States Court of Appeals for the Fifth Circuit has rendered a decision in conflict with the decisions of this Honorable Court in the cases of *Griffin v. McCoach, 313 U. S. 498, 61 S. Ct. 1023, 85 L. Ed. 1481, 134 A. L. R. 1462 (1941); Angel v. Bullington, 330 U. S. 183, 67 S. Ct. 657, 91 L. Ed. 832 (1947)*, and *Woods v. Interstate Realty Company, 337 U. S. 535, 69 S. Ct. 1235, 93 L. Ed. 1524 (1949)*, and with the decision of the United States Court of Appeals for the Seventh Circuit in the case

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of *Trust Company of Chicago v. Pennsylvania Railroad Company, 183 F. 2d 640 (1950)*, and with the decision of the United States Court of Appeals for the Second Circuit in the case of *Mottolese v. Kaufman, 176 F. 2d 301 (1949)*, in all of which it is held that in diversity of citizenship cases a Federal Court is, in effect, only another court of the state in which it sits. The Texas courts would have declined jurisdiction had the suit been filed in the State Court. *Mexican National Railway Company v. Jackson, 89 Tex. 107, 33 S. W. 857, 31 L. R. A. 276, 59 Am. St. Rep. 28 (1896); Banco de Mexico v. Da Carmara (Tex. Civ. App., application for writ of error dismissed), 55 S. W. 2d 631 (1933); Johnson v. Employers Liability Assurance Corporation, Ltd. (Tex. Civ. App.—writ refused), 99 S. W. 2d 979 (1936); Carter v. Tillery (Tex. Civ. App.—writ refused—n. r. e.), 257 S. W. 2d 465 (1953).*

B. The United States Court of Appeals for the Fifth Circuit has rendered a decision in conflict with the decision of this Honorable Court in the case of *Gulf Oil Corporation v. Gilbert, 330 U. S. 501, 67 S. Ct. 839, 91 L. Ed. 1055, 1062 (1947)*, wherein the court holds that the doctrine of *forum non conveniens* leaves "much to the discretion of the court to which plaintiff resorts."

C. The United States Court of Appeals for the Fifth Circuit has rendered a decision in conflict with the decisions of this Honorable Court in the cases of *Slater v. Mexican National Railroad Company, 194 U. S. 120, 24 S. Ct. 581, 48 L. Ed. 900 (1904)*, and *Cuba Railroad Company v. Crosby, 222 U. S. 473, 32 S. Ct. 132, 56 L. Ed. 274*

(1912), and the decision of the United States Court of Appeals for the Second Circuit in the case of *DeSairigne v. Gould, 83 F. Supp. 270 (1949), affirmed, 177 F. 2d 515, cert. den., 339 U. S. 912, 70 S. Ct. 571, 94 L. Ed. 1338*, wherein it is held that when a defendant is amenable to process in a foreign country and has assets therein out of which a judgment can be satisfied, the proper forum for the trial of disputes arising under the laws of such foreign country is that country.

D. Should our assertions that conflicts exist be erroneous, we say, in the alternative, that the United States Court of Appeals for the Fifth Circuit has decided an important question of Federal Law which has not been, but which should be, settled by the Supreme Court of the United States.

VI.

ARGUMENT AMPLIFYING REASONS

A. The courts of Texas would have declined to assume jurisdiction had this suit been filed in the State Court. Texas cases cited under Reason A., supra. This is recognized by the Court of Appeals in its opinion when it says "it is not disputed that there is no other available forum in this country." That the State Court would have declined jurisdiction was recognized by this Court in the case of *Slater v. Mexican National Railroad Company, 194 U. S. 120, 24 S. Ct. 581, 48 L. Ed. 900 (1904)*. That suit was brought by *citizens of Texas* against a Colorado corporation for damages for a tort occurring in Mexico. To allow

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a citizen of New York to maintain a suit against a citizen of Texas in the Federal District Court of Texas when such suit could not have been maintained by a citizen of Texas against a citizen of New York, or even against another citizen of Texas, in the State Court, is to grant to the New York citizen a privilege not enjoyed by a Texas citizen in the Texas courts. *Johnson v. Employers Liability Assurance Corporation, Ltd. (Tex. Civ. App.—writ refused), 99 S. W. 2d 979 (1936); Carter v. Tillery (Tex. Civ. App.—writ refused—n. r. e.), 257 S. W. 2d 465 (1953).* The granting of such a privilege is contrary to the holding of this Court in *Woods v. Interstate Realty Company, 337 U. S. 535, 69 S. Ct. 1235, 93 L. Ed. 1524 (1949)*, in which it was held that in diversity of citizenship cases a Federal Court is only another court of the state and that when one is barred from recovery in the State Court he should likewise be barred in the Federal Court.

B. *Herrick v. Railroad, 31 Minn. 11, 16 N. W. 413*, cited and quoted from by the Court of Appeals (footnote 4 of Opinion) as authority for denying the trial judge any discretion in this case, has been overruled by the Supreme Court of Minnesota. *Johnson v. Chicago B. & O. Railroad Company (Minn.), 66 N. W. 2d 763 (1954).* It is unquestioned that the Respondent's cause of action, if any, arose in Mexico, and that Petitioner is amenable to process in that country. Given those factors, the application of the doctrine of *forum non conveniens* leaves much to the discretion of the trial court. *Gulf Oil Corporation v. Gilbert, 330 U. S. 501, 67 S. Ct. 839, 91 L. Ed. 1055 (1946).* Among

the factors there listed and taken into consideration here, are the relative convenience of the parties, access to sources of proof, availability of compulsory process, cost of obtaining attendance of willing witnesses, enforcibility of a judgment, whether or not the plaintiff is seeking to harass the defendant by suing in an inconvenient forum and matters of public interest, including the burden imposed upon jurors of trying fact issues in controversies which are not of local interest.

In addition to those factors, there are to be considered in this case the reviewability of the trial court's decision in this case in which the applicable foreign law is a question of fact. *Hudson River Pulp & Paper Company v. H. H. Warner & Company (C. C. A. 2), 39 C. C. A. 452, 99 F. 187 (1900); Compania Trans-Continental de Petroleo, S. A. v. Mexican Gulf Sulphur Company (C. C. A. 2), 292 F. 846 (1923).* The prospect of a successful appeal from the trial court's decision on the merits would seem to be chimerical if the case must be tried before a judge whose conclusions of law are as final as are his findings of fact.

The question of comity of nations is also present since the transactions between the parties to this suit were incident to the performance by Respondent of a contract between him and Petroleos Mexicanos, a branch of the Mexican Government. (R. 32.) Petroleos may have some rights to be adjudicated and should be given an opportunity to be heard.

C. The relative convenience of the parties, access to sources of proof, availability of compulsory process for attendance of unwilling and the cost of obtaining the attendance of willing witnesses, the enforcibility of a judgment, whether Respondent is seeking to vex, harass, or oppress the Petitioner, and questions of public interest involved are fact questions. The findings of the trial judge on such fact questions are binding on the Court of Appeals in the absence of a showing that there is no substantial evidence to support them.

D. The voluntary dispersal of American citizens all over the world in various business ventures in which they deal with each other in foreign countries intending that their rights be determined according to the laws of the foreign countries, suggests the need for a decision by the Supreme Court of the United States on the question involving the application of the doctrine of *forum non conveniens* by the Federal Courts to such transactions. The Court of Appeals dismissed as obiter dictum the hereinafter quoted language of this Court in the case of *Cuba Railroad Company v. Crosby, 222 U. S. 473, 32 S. Ct. 132, 56 L. Ed. 274 (1912)*, viz:

> "But it should be remembered that parties do not enter into civil relations in foreign jurisdictions in reliance upon our courts. They could not complain if our courts refused to meddle with their affairs, and remitted them to the place that established and would enforce their rights. * * * The only just grounds for complaint would be if their rights and liabilities, when enforced by our courts, should be measured by a different rule from that under which the parties dealt."

There a citizen of Tennessee had sued a New Jersey corporation in the New Jersey Federal Court *(170 F. 369)* for damages for an injury sustained in Cuba.

WHEREFORE, Petitioner prays that this petition for writ of certiorari to review the judgment of the Court of Appeals for the Fifth Circuit be granted.

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Amarillo, Texas,
Attorneys for Petitioner.

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APPENDIX

ORDER OF DISMISSAL

Filed: 7-7-54

In the United States District Court for the Northern District of Texas, Amarillo Division.

Edward R. Burt, Plaintiff,

v. Civil Action No. 1723.

Isthmus Development Company, a corporation, Defendant.

On April 30, 1954, the motion of the defendant, as contained in its First Amended Original Answer, that this is a forum non conveniens and that the more convenient and proper forum for the trial of this cause is the Republic of Mexico, was submitted to the Court and the Court, having considered said motion, the affidavits attached thereto, the depositions and admissions and requests for admissions on file, the testimony of the witness, R. E. O'Donnell, and the argument of counsel, is of the opinion that said motion should be sustained.

It is, therefore, Ordered, Adjudged and Decreed that this suit brought by Edward R. Burt v. Isthmus Development Company, a corporation, and the cross-action brought, subject to the action of the Court on its said motion to the convenience of the forum, by Isthmus Development Company, a corporation, against the plaintiff, Edward R. Burt, be, and the same are hereby, dismissed pursuant to the aforesaid motion without prejudices to the rights of the parties to further prosecute the same.

It is further Ordered, Adjudged and Decreed that all costs herein be taxed against the plaintiff, Edward R. Burt, for which the officers of this Court may have their execution.

Rendered and Entered this the 7th day of July, 1954.

/s/ JOS. B. DOOLEY,
(Jos. B. Dooley),
United States District Judge.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 15,206

EDWARD R. BURT,

Appellant,

v.

ISTHMUS DEVELOPMENT COMPANY,

Appellee.

Appeal from the United States District Court for the Northern District of Texas.

(January 12, 1955.)

Before HUTCHESON, Chief Judge, RIVES, Circuit Judge, and DAWKINS, District Judge.

DAWKINS, District Judge: Appellee is a corporation organized under the laws of and domiciled in the State of Texas. Appellant, a citizen of New York, brought this action for the recovery of money and equipment allegedly belonging to him and illegally retained by the appellee and

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for damages, in the total amount of $38,393.00. The original complaint alleged: that appellant was the owner of an oil and gas lease on certain lands in the Republic of Mexico and was desirous of obtaining experienced personnel to drill a test well thereon; that he and appellee's vice president, R. E. O'Donnell, conducted negotiations toward that end; that O'Donnell suggested appellee would furnish certain experienced personnel to do the work and that he (O'Donnell) would personally supervise the proposed operations; that appellant acquired a bulldozer and a welding unit and placed them in the custody of appellee at its camp in Mexico; that appellant subsequently mailed his checks to appellee in the sum of $27,500.00 to be used for the rental of a drilling rig and the purchase of certain supplies; that he expressly advised appellee not to use the money or equipment unless O'Donnell could personally supervise the operation; that appellee had not furnished experienced personnel, and O'Donnell had not personally supervised any activity and appellant had demanded the return of his money and equipment; that appellee had repeatedly refused to return either.

Appellee answered, alleging: that the parties had entered into a contract whereby appellee would furnish personnel for drilling operations and would conduct such operations in appellant's behalf; that if there were an agreement to have O'Donnell supervise such operations, which was denied, the agreement contemplated that his supervision would be carried on in connection with and subject to the performance of his other duties as vice president and gen-

eral manager of appellee's business in Mexico; that appellee had done some work and incurred certain expenses in preparing for such operations and that appellant repeatedly refused to pay these expenses or advance sufficient sums for the rental of drilling equipment. A copy of the alleged contract was attached to the answer, and appellee made a cross-claim in the amount of $17,500.00 for alleged expenses and damages for breach of contract.

Appellant filed a reply in which he admitted that the document attached to appellee's answer was a true copy, but asserted that it was only a proposed contract which he had signed with the definite understanding that it would not constitute a contract or be executory unless and until appellee specifically agreed to and did furnish the personal supervision of O'Donnell. He averred that when he signed the document and returned it to appellee, he wrote an accompanying letter in which he made that position clear.

Stating that appellant's reply pleading set up "an entirely different fact situation," appellee filed a motion to dismiss "because the Court is without jurisdiction and because this is a forum non conveniens." In support of the motion appellee alleged: (1) that all of the transactions pleaded occurred in Mexico and were governed by the laws of that republic, a civil law nation whose laws the Federal District Court of Texas is not empowered to administer, (2) that appellee was organized as a "western hemisphere trade corporation" (see 56 Stat. 838; 26 U. S. C. A. 109), all of whose business other than the purchase of equipment in the United States is conducted in Mexico by arrange-

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ment with Petroleos Mexicanos, a branch of the Mexican Government; that all of its records are in Mexico and all of the individuals involved in the negotiations with appellant reside and work in Mexico; (3) that the operations being carried on by appellee at that time required the constant presence and supervision of O'Donnell and that it would be virtually impossible to have him and other individuals present for the trial in Texas; (4) that appellant was simply seeking to vex and harass appellee by the institution of the suit in Texas; and (5) that the contract between the parties specifically provided that the interpretation and performance should be governed by the laws of Mexico, both parties expressly submitting themselves to competent tribunals in the Federal District of Mexico and waiving the jurisdiction of any other court or courts.

Excerpts from a deposition of appellant and O'Donnell's testimony taken in support of the motion to dismiss are in the record. In addition to enlarging the position set forth in his pleadings, appellant did, in effect, admit that all of the negotiations occurred in Mexico. O'Donnell's testimony amplified the position taken by appellee in its motion to dismiss. The trial judge sustained the motion without opinion, and the appeal from his order raises the following questions: (1) is there discretion in the District Court to decline jurisdiction on the ground of inconvenience where both parties are American citizens, the suit is brought at the domicile of the defendant and the only other competent tribunal is in a foreign country; and (2) if such discretion exists, was it properly exercised in the instant case?

The statutory requirements of jurisdiction and venue are fully met in this case, and it is not disputed that there is no other available forum in this country. We have found no authorities directly passing upon the first point raised by appellant, although the general problem presented is not new.[1] There are judicial expressions to the effect that statutory grants of jurisdiction are absolute and cannot be ignored by courts in the exercise of discretion. See *Cohens v. Virginia, 6 Wheat. 264; Hyde v. Stone, 20 How. 170; Kline v. Burke Construction Company, 260 U. S. 226; The Neck (D. C., Wash.), 138 F. 144;* and *Momand v. Paramount (Mass.), 19 F. Supp. 102.* See also cases cited in *32 A. L. R. 6, et seq.*

That such expressions are unsoundly broad and general is clear, for it has also been held that there exists in the federal courts an inherent power to decline jurisdiction in the interest of justice; and the doctrine of *forum non conveniens* is now well established in federal practice. *Gulf Oil Corp. v. Gilbert, 330 U. S. 501; Koster v. Lumbermen's Mutual Casualty Co., 330 U. S. 518.*

As early as 1897, in passing upon the propriety of the trial court's dismissal of a suit between a resident of Texas and a resident of Massachusetts on a cause of action arising in Mexico, this court remarked that "the right to sue is specifically granted by statute, and appears to be absolute." However, it proceeded to discuss and pass upon the merits of the defendant's contentions of inconvenience and

[1] Compare *The Saudades (Pa.), 67 F. Supp. 820.*

impropriety, although the doctrine of *forum non conveniens*, as such, was not then an integral part of the federal practice. *Evey v. Mexican Central Ry. Co., 5 Cir., 81 F. 294.* Similar decisions followed in *Mexican Central Ry. Co. v. Marshall, 5 Cir., 91 F. 933*, and *Mexican Central Ry. Co. v. Jones, 5 Cir., 107 F. 64.*

In admiralty, courts have often refused to entertain actions between aliens, or between citizens and aliens where foreign law would govern the issues, and have relegated the litigants to the foreign court. See, for example, *Canada Malting Co. v. Paterson Steamships, 285 U. S. 413*, and cases there cited; *United States M. & S. Ins. Co. v. A/S Den Norske Afrika Og Australie Line, 2 Cir., 65 F. 2d 392.* See also *DeSairigne v. Gould (N. Y.), 83 F. Supp. 270, affirmed 2. Cir., 177 F. 2d 515.*

Very few such cases, however, has specifically applied the doctrine of *forum non conveniens* by name. Rather, such action has been explained on the ground that admiralty courts, like those of equity, have greater and more unrestricted jurisdictional discretion because of the nature of the proceedings over which they sit. *Grignon's Lessee v. Astor, 43 U. S. 319, 337; United States M. & S. Ins. Co. v. A/S Den Norske Afrika Og Australie Line*, supra. See Mr. Justice Black, dissenting in *Gulf Oil Corp. v. Gilbert, 330 U. S. 512.* And the very fact that admiralty courts have wide and practical powers was held in at least one case to require the trial of issues thought by the trial court to impose too great a burden of inconvenience upon it and

the defendant. See *Swift & Co. Packers v. Compania Colombiana Del Caribe, 339 U. S. 684.*[2]

In the academic sense, there is much to be said in favor of appellant's contention that no discretion exists in this case. This nation has historically been most solicitous of its citizens' welfare and its courts exist as much for the adjudication of its citizens' controversies as for the enforcement of its laws. Particularly is that true with respect to the diversity of jurisdiction of the federal courts, for that jurisdiction was established because of the desire to insure a competent and impartial tribunal for citizens of different states.

Where a citizen has an option of bringing his action in one of two *United States* courts, it is neither unreasonable nor arbitrary to require him in a proper case to bring it in that court which can most conveniently and expeditiously determine the issues.[3] Congress has specifically granted the power to transfer in certain cases *(28 U. S. C. A. 1404)*, and there are many cases approving the declination of jurisdiction on the ground of inconvenience.

In all such cases, save the admiralty decisions previously mentioned, there has been at least one other forum *in the United States* in which the suit might have been brought.

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[2] In that case the Supreme Court remarked: "The doctrine [*forum non conveniens*] is of long standing in admiralty, but this Court has not previously had to apply it to a suit brought by a United States citizen. * * * We need not now decide the abstract question whether United States admiralty courts may decline jurisdiction over libels brought by United States citizens." *339 U. S. 697.*

[3] "In all cases in which the doctrine of *forum non conveniens* comes into play, it presupposes at least two forums in which the defendant is amenable to process; the doctrine furnishes criteria for choice between them" *Gulf Oil Corp. v. Gilbert, 330 U. S. 506.*

The clash was between *United States* courts of concurrent jurisdiction, and we have found no cases in which a resident citizen suing in his own right was dispatched to a foreign court. It strikes us as being inconsistent with the very purpose and function of the federal courts to hold that one may decline to hear a case and thereby in effect decree that a citizen must go to a foreign country to seek redress of an alleged wrong. Nevertheless, because we are of the belief that it is unnecessary to do so here, we are not prepared flatly to hold that no discretion exists in *any* such case to decline jurisdiction. Experience has taught that such a holding may prove unsound in extreme cases; and the Supreme Court in the *Swift* case, supra, declined to pass upon a similar point. We leave that question open.

We do, however, express the view that courts should require positive evidence of unusually extreme circumstances, and should be thoroughly convinced that material injustice is manifest before exercising any such discretion to deny a citizen access to the courts of this country. We find no such circumstances or manifest injustice here; and discretion, if it exists, cannot sustain the trial court's action in dismissing the suit.

There are, no doubt, difficulties in attempting to determine and apply foreign law; but the necessity to do so often occurs. The federal courts in diversity cases often encounter difficulty in determining the law of the very state in which they sit. See, for example, *Meredith v. Winter Haven, 320 U. S. 228; Wright v. Paramount-Richards Theatres, 5 Cir., 198 F. 2d 303.* In such cases, the rules of

the foreign law and their interpretation are simply questions of fact, and the conclusion is as reviewable as any other fact issue. See *Liechti v. Roche, 5 Cir., 198 F. 2d 174; Daniel Lumber Co. v. Empresas Hondurenas, 5 Cir., 215 F. 2d 465.* A different situation might be presented if the federal court were being asked to enforce some equitable or otherwise unusual relief peculiar to the foreign law, but here the appellant is simply seeking a money judgment which, so far as the record shows, can be executed against appellee in Texas. The fact that success or failure depends upon the law of Mexico does not, of itself, justify dismissal.[4]

Neither are we impressed by the allegations that appellee's operations are carried on primarily in Mexico. It must be remembered that appellee is a *Texas corporation* and that this suit was brought at its *domicile* which its incorporators chose and established. So far as we know, appellee has no other place of business in this country; surely it cannot complain of being sued at its headquarters and domicile on the ground that a major portion of its actual operations occurs elsewhere.

Appellee's argument that all negotiations occurred in Mexico, that all its witnesses are there and that it will

[4] In *Evey v. Mexican Central Railway Co.*, supra, this court quoted from *Herrick v. Railway Co., 31 Minn. 11, 16 N. W. 413, and we think* the remarks are pertinent here: "Every day our courts are enforcing rights under foreign contracts where the lex loci contractus and the lex fori are altogether different, and yet we construe these contracts and enforce rights under them according to their force and effect under the laws of the state where made To justify a court in refusing to enforce a right of action which accrued under the law of another state, because against the policy of our laws, it must appear that it is against good morals or natural justice, or that for some other such reason the enforcement of it would be prejudicial to the general interests of our own citizens." *81 F. 304.*

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cause an extreme hardship to remove its employees from their work in Mexico is a serious one. In different circumstances, it would be more meritorious; but here we are of the opinion that the obvious inconvenience to appellee is off-set by other factors. We again advert to the fact that appellee is being sued at its domicile—in the state where it chose to organize. Further, appellant himself is necessarily inconvenienced in having to prosecute his claim far removed from his own residence, and to force him to litigate in Mexico would only compound that disadvantage. It should also be observed that O'Donnell, the witness so heavily relied upon by appellee, was personally present in Amarillo when his testimony was taken in support of the motion to dismiss.

Appellee also contends that appellant is simply seeking to vex and harass it, citing several acts or "threats" on the part of appellant. The short answer to this contention is that there is nothing in the record to show that such acts, if they occurred, were not justified, or at least based upon good cause. In view of the other circumstances previously mentioned, we cannot ascribe that motive to appellant.

Appellee finally contends that its contract with appellant restricts the parties to Mexican courts in express terms. It is sufficient to point out that one of the important questions, probably the basic issue, raised by the pleadings is whether or not the negotiations ever matured into a contract. It would be incongruous to remand the appellant to

Mexico because of provisions in a contract the very existence of which is in dispute.

For the reasons assigned, the judgment of dismissal is reversed and the cause is remanded for further proceedings not inconsistent with the view expressed herein.

REVERSED AND REMANDED.

A True copy:
Teste:

.....
Clerk of the United States Court
of Appeals for the Fifth Circuit.

JUDGMENT

Extract from the Minutes of January 12, 1955.

EDWARD R. BURT,

No. 15206. versus

ISTHMUS DEVELOPMENT COMPANY.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of dismissal of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for further proceedings not inconsistent with the views expressed in the opinion of this Court.

ORDER DENYING HEARING

Extract from the Minutes of February 3, 1955.

EDWARD R. BURT,

No. 15206. versus

ISTHMUS DEVELOPMENT COMPANY.

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

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HAROLD B. WILLEY,

In the

Supreme Court of the United States

October Term, 1954

No. 680

ISTHMUS DEVELOPMENT COMPANY,
Petitioner,

v.

EDWARD R. BURT,
Respondent.

PETITIONER'S REPLY BRIEF ON PETITION FOR WRIT OF CERTIORARI

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To the Honorable Earl A. Warren, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

In reply to the Respondent's Brief Opposing Petition for Certiorari, your petitioner submits the following:

I.

ARGUMENT

1. The Texas Decisions.

The Respondent's witness, Branch testified that from 1912 until 1923 Mexico was torn with strife but that it had

had a stable government for a good many years in 1954. (R. 192, 221-222.) The cases of *Banco Minero v. Ross, 172 S. W. 711* and *Mendiola v. Gonzales, 185 S. W. 389*, were decided in 1915 and 1916, respectively. Those cases were decided during the period when the Revolution was going on in Mexico and when Northern Mexico, particularly, was in such a state of anarchy that the United States subsequently dispatched an Expeditionary Force under General Pershing into that unhappy country for the purpose of restoring order. Senor Branch's deposition discloses that such conditions terminated long ago. The Texas cases have all declined to accept jurisdition when there existed a stable government in Mexico.

The leading Texas case is *Mexican National Railway Company v. Jackson, 89 Tex. 107, 33 S. W. 857, 31 L. R. A. 276, 59 Am. St. Rep. 28 (1896)*. Concedely one of the reasons for declining jurisdiction in that case was the difference between the method of enforcing a judgment in Mexico and enforcing a judgment in Texas Other reasons were stated in that case. We quote the following excerpts:

> "The reason which influences the courts of one state to permit transitory actions for torts to be maintained therein, when the right accrued in a foreign state or country, is that the defendant, having removed from such other state or country, cannot be subjected to the jurisdiction of the courts where the cause of action arose, and as matter of comity, but more especially to promote justice, the courts of the place where he is found will enforce the rights of the injured party against him, because it would be unjust that the wrongdoer should be permitted, by removing from the

country where he inflicted the injury, to avoid reparation for the wrong done by him."

* * * * * *

"If our courts assume to adjust the rights of parties against those railroads, growing out of such facts as in this case, we will offer an invitation to all such persons who might prefer to resort to tribunals in which the rules of procedure are more certainly fixed, and the trial by jury secured, to seek the courts of this state to enforce their claims. Thus we would add to the already overburdened condition of our dockets in all the courts, and thereby make the settlement of rights originated outside the state, under the laws of a different government, a charge upon our own people. If the facts showed that this was necessary in order to secure justice, and the laws were such as we could properly enforce, this consideration would have but little weight; but we feel that it is entitled to be considered where the plaintiff chooses this jurisdiction as a matter of convenience, and not of necessity." [See Johnson v. Chicago, Burlington & Quincy Railroad Company (Minn.), 66 N. W. 2d 763 (1954).]

This court held in *Woods v. Interstate Realty Company, 337 U. S. 535, 69 S. Ct. 1235, 93 L. Ed. 1524 (1949)*, that when a decision rests on two or more grounds none can be relegated to the category of obiter dictum.

The Court of Appeals had the briefs of both parties before it. The Respondent there cited the same Texas cases which he cites here. The Court of Appeals concluded that the only court in the United States in which the Respondent could subject the defendant to litigation was the United States District Court for the Northern District of Texas. We must infer from this language of the opinion that the Court of Appeals was satisfied that the Texas courts would decline to take jurisdiction.

2. *The Presumption is that the law of Mexico is different from the law of Texas.*

In *Cuba Railroad Co. v. Crosby, 222 U. S. 473, 32 S. Ct. 132, 56 L. Ed. 274 (1912), at page 276* the court says:

> "In the case at bar the court was dealing with the law of Cuba, a country inheriting the law of Spain, and we may presume, continuing it with such modification as later years may have brought. There is no general presumption that that law is the same as the common law. We properly may say that we all know that to be otherwise."

In that case a judgment for plaintiff was reversed because he had not pleaded the law of Cuba.

In *Ozanic v. U. S., 165 F. 2d 738, 744 (1948)*, the court held that Yugoslavia was a Civil Law Country, and that it would not be presumed that the Yugoslavic law was the same as that of the United States.

3. *The Procedure followed by the Court of Appeals for the Fifth Circuit in ascertaining Foreign Law is Contrary to the Doctrine Laid Down by this Court in Cuba Railroad v. Crosby.*

In *Cuba Railroad Company v. Crosby, 222 U. S. 473, 32 S. Ct. 132, 56 L. Ed. 274 (1912)*, a citizen of Tennessee sued a New Jersey corporation in the Circuit Court of the latter state. *(170 Fed. 369.)* The case grew out of an injury sustained by the plaintiff in Cuba. A judgment for plaintiff

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was reversed because he had not pleaded the law of Cuba. This Honorable Court said:

> "But it should be remembered that parties do not enter into civil relations in foreign jurisdictions in reliance upon our courts. They could not complain if our courts refused to meddle with their affairs, and remitted them to the place that established and would enforce their rights. * * * The only just grounds for complaint would be if their rights and liabilities, when enforced by our courts, should be measured by a different rule from that under which the parties dealt."

Quite inconsistent with this language is that of the Court of Appeals in the case of *Daniel Lumber Company v. Empresas Hondurenas, S. A. (U. S. C. A., 5), 215 F. 2d 465 (1954)*, in which the court says:

> "Once the foreign statutes had been proved, the district court had the duty of construing them for itself with the aid of but without being bound by the opinions of the expert witnesses. Finney v. Guy, supra; Eastern Building, etc., Association v. Williamson, supra; Liechti v. Roche, supra. The court's construction of the foreign statutes might in its own good judgment be guided by the logic and reasoning underlying similar rules of the common law."

4. *Petitioner's Affirmative Invocation of the Jurisdiction of the District Court.*

Whether properly or not, Petitioner construed the complaint to be a suit for a breach of contract and so framed its answer. (R. 6.) Attached to the answer was a copy of the contract which Petitioner believed and still believes, had been entered into by the parties, such contract having been

signed by them. (R. 17-26.) Petitioner requested Respondent to admit the genuineness of the contract. (R. 8.) When Respondent denied the existence of a contract, Petitioner filed its motions to the jurisdiction and convenience of the forum. (R. 48.)

If the public policy of the State of Texas, as declared by its courts, denies jurisdiction to the Texas courts of controversies of this character, then the jurisdiction may be questioned at any time.

Because the allegations were changed from a claim for damages for breach of a written contract to those of a claim for damages for tort, the forum non conveniens plea does not come too late in this case.

The affirmative relief requested by Petitioner was on the contract, for additional rent and for expenses incurred by Petitioner in performing the contract between it and Respondent. (R. 14.)

CONCLUSION

WHEREFORE, Petitioner again prays that its petition for writ of certiorari to review the judgment of the Court of Appeals for the Fifth Circuit be granted.

Respectfully submitted,

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Attorneys for Petitioner.

BRIEF F

RESPOND

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In the

Supreme Court of the United States

OCTOBER TERM, A. D. 1954

No. 680

ISTHMUS DEVELOPMENT COMPANY,
Petitioner,

v.

EDWARD R. BURT,
Respondent.

RESPONDENT'S BRIEF OPPOSING PETITION FOR CERTIORARI

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RESPONDENT'S BRIEF OPPOSING PETITION FOR CERTIORARI

I.

THE QUESTION PRESENTED

The sole and only question presented in this case is:

> "Can a citizen of New York be denied, under the doctrine of forum non conveniens, the right to prosecute a suit against a citizen of Texas, in the district of defendant's residence, for damages resulting from conversion of plaintiff's property by defendant in Mexico?"

II.

STATEMENT

Plaintiff is a citizen and resident of the State of New York. Defendant is a corporation organized under the laws of and domiciled in the State of Texas (R. 56, 60, 144-148); its officers and directors are residents and citizens of Texas; its principal office and place of business is in Amarillo, Texas (R. 147), within the jurisdiction of the United States District Court for the Northern District of Texas, Amarillo Division (where the suit was instituted); its president maintains his home and office in Amarillo, Texas.

The suit is one for damages resulting to plaintiff from the alleged conversion by defendant in Mexico of money and property belonging to plaintiff. There is no evidence which shows that there is any difference between the laws of Mexico and those of Texas as to liability for a conversion of the character involved. On the contrary, it was shown by the testimony of an experienced Mexican attorney that under the law of Mexico, if one party delivers personal property consisting of money or other personalty to another and the other party rightfully holds the property but thereafter the owner of the property demands its return, and the holding party refuses to return the money and other personalty, the Mexican law gives the owner of the property a right against the holder of the property; that in the case of money, the person wrongfully withholding the money is bound to return the money with 6 per cent inter-

est, and the same is true as to property other than money (R. 210, 211). This is, of course, the same as is the law of Texas and other states. The Court of Appeals reversed the holding of the District Judge that the case was proper for the application of the principles of forum non conveniens; that plaintiff's suit could be prosecuted only in Mexico.

III.

ARGUMENT

1. Texas Courts Would Not Refuse Jurisdiction

In support of its argument that the doctrine of forum non conveniens should be applied, Petitioner argues that the Texas courts would not take jurisdiction of such a case as this and therefore that the Federal courts, notwithstanding their jurisdiction based on diversity of citizenship, should relegate citizens of the United States to the courts of Mexico for prosecution of claims against other citizens based on conversion of property in Mexico. But Petitioner wholly misinterprets the basis for the holdings in the Texas cases on which it relies.

Thus, the denial of jurisdiction in *Mexican National Railway Co. v. Jackson, 33 S. W. 857*, was because of the great dissimilarity shown to exist between the laws of Texas and those of Mexico as to liability of railroads to its employees, and the methods for determining and enforcing that liability. The basis for the decision in *Banco de Mexico v. De Camara, 55 S. W. 2d 631*, was the fact that under the Mexican law liens on personal property were unlawful

and therefore a purchase in Mexico by defendant from the person who had given the mortgage in Texas could not give a cause of action against defendant in Mexico for conversion. It is also significant that in that case the evidence affirmatively showed that the laws dealing with such matters were so dissimilar in Mexico from those in Texas as to be incapable of enforcement in Texas courts. Cases similar in nature are *El Paso & Juarez Traction Co. v. Carruth, 255 S. W. 159*, and *Carter v. Tillery, 257 S. W. 2d 465.*[1] The same principle is applied even when dealing with special laws of sister states which in their mechanics are not enforceable in other states. *Johnson v. Employers Liability Assurance Corporation, 99 S. W. 2d 979 (Workmen's Compensation Laws).*

But this case does not come within the principles applied in the cases referred to. The evidence shows without dispute that there is no such dissimilarity in substance as to liability under the facts set forth in the complaint as between the laws of Mexico and the laws of Texas. Instead of being ruled by cases such as *Mexican National Railway Co. v. Jackson*, supra, *Slater v. Mexican National Railroad Co.*, supra, and other cases hereinabove referred to, this case is ruled by the opinion of the Supreme Court of Texas in *Banco Minero v. Ross, 172 S. W. 711*, a decision that has never been overruled, modified or criticized. That case, as

[1]Other cases applying the same principles are *Slater v. Mexican National Railroad Co.* (5 Cir.), 115 Fed. 593; *Slater v. Mexican National Railroad Co.*, 194 U. S. 120, and *Cuba Railroad Co. v. Crosby*, 222 U. S. 473. The holdings in all these cases are based on the dissimilarity between the foreign laws and the laws here which make it impracticable to enforce the foreign laws as to the particular type of controversy there involved.

this, was an action for conversion which took place in Mexico, the action there was by citizens of the United States against a citizen of Mexico. The court held that the Texas courts had jurisdiction. Plaintiffs in that case had deposited with a bank in Mexico a sum of money for a specific purpose. The bank failed to return the money on demand, whereupon suit based on conversion in Mexico was filed in the Texas courts, and jurisdiction was sustained.[2]

There is obviously no conflict between the rule of *Banco Minero v. Ross* and the rule of *Mexican National Railway Co. v. Jackson*. The cause of action in the *Ross* case was, as this, one purely for conversion—a transitory cause of action. There was nothing to show that the law of Mexico as to conversion was different from that of Texas and the jurisdiction of the Texas courts was sustained.

The question here discussed was presented to and determined by the Court of Appeals for the Fifth Circuit adversely to the contention of Petitioner. This court ordinarily accepts the holding of that court on questions of state law.[3]

The decision of the Court of Appeals was by "three judges who are constantly required to pass upon" Texas law questions. One of the three judges (who has been a member of the Court of Appeals for many years) was a District Judge in Texas prior to becoming a member of the court and before that was active in the practice of law in

[2] See also *Mendiola v. Gonzales*, 185 S. W. 389.

[3] *Helvering v. Stuart*, 317 U. S. 154, 163; *Spiegel's Estate v. Commissioner*, 335 U. S. 701, 708.

Houston, Texas. None of the members of the court was favorably impressed with Petitioner's theory that there was a lack of jurisdiction in the Texas courts.

2. The Doctrine of Forum Non Conveniens Has Never Been Held to Prohibit a Determination in the United States Courts of Controversies of This Character

The doctrine of forum non conveniens is applied only in rare cases. Unless the balance is strongly in favor of defendant, the plaintiff's choice of a forum should rarely be disturbed. *Gulf Oil Corporation v. Gilbert, 330 U. S. 501, 508, 509.* It has been frequently applied, primarily in admiralty cases, so as to deprive aliens of the privilege of instituting suits in our courts where the applicable laws of the alien's country as to a particular controversy are substantially different from those of this country. Ordinarily, in even admiralty cases, the doctrine has been applied only against alien plaintiffs. In *Swift & Co. v. Compania Columbiana, 339 U. S. 684, 697,* the Court stated that it had not previously had to apply the doctrine to a suit brought by a United States citizen and declined to decide that abstract question. It observed that the application of forum non conveniens principles to a suit by a United States citizen against a foreign respondent brings into force considerations very different from those in suits between foreigners.

The cases support the Court's analysis. *Canada Malting Co. v. Paterson Steamships, 285 U. S. 413,* was a suit instituted by citizens of Canada against a Canadian citizen

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for damages resulting from a collision between Canadian vessels in Lake Superior on the American side of the International boundary. All the officers and crew of each vessel were citizens of Canada. The Court held that principles of forum non conveniens were properly applied.

United States M. & S. Ins. Co. v. A/S Den Norske Etc. Line, 65 F. 2d 392 (C. A. 2d), was a suit filed by a United States citizen as plaintiff against a Norwegian corporation, but the Court held that plaintiff was only a subrogee and that its rights were no greater than its subrogor, a Dutch citizen, and applied the same principles as those applicable where both plaintiff and defendant are aliens. *O'Neill v. Cunard White Star, 160 F. 2d 446*, was an admiralty proceeding by a British subject against a British corporation for damages for death resulting from an occurrence on the high seas. The Court stated that although a court of admiralty has jurisdiction over a suit between aliens, it is not obliged to exercise that jurisdiction.

De Sairigne v. Gould, 83 F. Supp. 270 (D. C., S. D. N. Y.), was not an admiralty suit but was a proceeding filed by a citizen of France against a citizen of the United States, but who then resided in France. Moreover, it was affirmatively shown that the applicable French laws "are quite different from, and inconsistent with our laws."

Petitioner does not cite a case where, even in admiralty cases, it has been held that a citizen of the United States must go to a foreign country to sue another citizen of the United States in an ordinary action for conversion, merely

because the conversion occurred in a foreign country. The obligation to make restitution is the obligation of the corporation and its officers wherever they may be.[4]

3. Even Under the Rule Applicable Between Different Courts in the United States, No Sufficient Showing of Hardship Was Made to Justify Application of the Principle of Forum Non Conveniens

The primary issue in this case is whether or not there ever was a contract between plaintiff and defendant. Unquestionably, a document was signed by the parties. It is plaintiff's contention that such document was only an offer and never became effective; that plaintiff's signature thereto was rescinded by telephone prior to any purported acceptance by defendant, and that such purported acceptance by defendant was accompanied by a condition that was never agreed to by plaintiff (R. 27). The transaction was the result of negotiations between plaintiff and one R. E. O'Donnell, vice president of defendant. It is in the evidence, and not denied, that under the laws of Mexico an offeror has the right to withdraw an offer before he is notified of acceptance by the offeree (R. 204). This is, of course, also the law in this country.

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[4]The conversion involved in this case is of the type involved in *Banco Minero v. Ross*, 172 S. W. 711, namely, a refusal to return on demand property held for a special purpose. It is not the type of conversion involved in *Banco de Mexico v. De Camara*, 55 S. W. 2d 631—the purchase by defendant from a third party of a truck on which plaintiff held a mortgage that under the Mexico law was invalid but under the laws of Texas was valid.

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The motion to dismiss on the ground of forum non conveniens was based on 7 alleged grounds (Pet. 4-5). Each will now be discussed, in the light of the record:

(1) *That the transactions pleaded occurred in Mexico and the Federal District Court of Texas is not empowered to administer or enforce the laws of that country because of the difference between the civil laws and the common law.* But the evidence did not establish such dissimilarity. Nor did the evidence show that all the negotiations occurred in Mexico. Plaintiff's controverting affidavit shows that a portion thereof occurred in New York (R. 231). No testimony was offered as to any dissimilarity in the laws. On the contrary, it was affirmatively shown that the law in Mexico as to both the right to rescind an unaccepted offer and the obligation to make restitution for a conversion is the same in Mexico that it is in the states. Furthermore, depositions as to the laws of Mexico were taken by plaintiff in Mexico. Counsel for defendant was present (R. 193) but did not adduce evidence showing such dissimilarity.

(2) *That Petitioner was organized as a Western Hemisphere Trade Corporation under 28 U. S. C. A. 109; that its business, other than the purchase of equipment, was conducted in Mexico; its records were in Mexico; and the individuals involved in the negotiations with Respondent were residing and working in Mexico.* Obviously, the fact that Petitioner is a "Western Hemisphere Trade Corporation" has nothing to do with the power of the United States courts to require it to account for conversion of property of other United States citizens. *26 U. S. C. A. 109* only has

the effect to place it in a special class for tax purposes. It is still a citizen of Texas and of the United States. If it has any pertinent records in Mexico, there is no reason why copies thereof may not be made just as copies are made in the United States.

Nor is there any reason why depositions of any employees who live in Mexico and know any facts may not be obtained. There is no evidence that any witness in Mexico is unwilling to give his deposition testimony.

(3) *That Petitioner is amenable to process in Mexico.* The fact that service may be had in Mexico on a vice president obviously constitutes no reason why a corporation should not be served at its home office by service on its president.

(4) *That the operations carried on by Petitioner in Mexico required the constant presence and supervision of its Vice President, R. E. O'Donnell.* Yet he was able to be in Amarillo on April 10, 1954, to give his deposition and identify all the documents thought to be pertinent (R. 144-150) and again in Amarillo on April 30 to testify in person in support of the motion to dismiss (R. 235-248). He was a director in the corporation and attended the last director's meeting which was held in May of the preceding year (R. 146).

The Court of Appeals considered it significant that Mr. O'Donnell was able to get away from his duties in Mexico to come to Amarillo to testify on the motion to dismiss. It also considered that there was an obvious inconvenience to plaintiff in having to come from his other work in New

York to Texas to prosecute his claim far removed from his residence and pointed out that to force him to litigate his claim in Mexico would only compound that inconvenience. (Pet. App. xi.)

(5) *That Respondent was simply seeking to vex and harass Petitioner by filing the suit in Texas.* This charge was categorically denied by Respondent under oath (R. 233). The Court of Appeals properly rejected that contention. A suit to recover what plaintiff firmly believes he is entitled to recover cannot be classified as one that is vexatious and harassing in the legal sense.

(6) *That most of Petitioner's assets are in Mexico and any judgment obtained by plaintiff could not be enforced by the United States District Court for the Northern District of Texas.* This should not be a matter of concern to Petitioner. Respondent is willing to run the risk of being able to collect the judgment and has no fears as to the powers of the United States District Court to enforce its decrees against a corporation domiciled in its jurisdiction.

(7) *That it would be an imposition upon the citizens of the Northern District of Texas who might be called as jurors to spend their time in attempting to solve a controversy "which was of entirely foreign interest."* But *no* foreign interest is here involved. The only interests involved are local to this country. If plaintiff succeeds, a citizen of Texas loses and a citizen of New York gains; if plaintiff does not succeed, the gain will be to a citizen of Texas and the loss will be that of a citizen of New York. This is not a case where aliens of the United States seek to use our courts

to settle their differences. The jurors in this country daily pass on the merits of disputes between citizens of different states.

4. Petitioner Affirmatively Invoked the Jurisdiction of the District Court

The complaint was filed in the District Court on January 13, 1954 (R. 1). Thereafter, on March 2, 1954 (R. 6), Petitioner filed its answer. That answer included a cross-complaint against Respondent for $17,500. Thereafter, on March 17, 1954, Respondent filed its response to the cross-complaint (R. 27). The motion to dismiss based on forum non conveniens was not filed until March 29, 1954 (R. 48). The matters set forth in the cross-complaint grow out of the same transactions as those set forth in the complaint. Having affirmatively invoked the jurisdiction of the District Court by filing the cross-complaint Petitioner can hardly say with good grace that those transactions should be inquired into only in Mexico.

CONCLUSION

Respondent respectfully says that the application for certiorari should be denied.

Respectfully submitted,

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